International Courts and Tribunals

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The most significant developments in 1999 regarding international courts and tribunals are reviewed herein, particularly events relating to the International Court of Justice, the United Nations Compensation Commission, the Iran-U.S. Claims Tribunal, the Claims Resolution Tribunal for Dormant Accounts in Switzerland, and the International Commission on Holocaust Era Insurance Claims. Other significant developments relating to the creation of the permanent International Criminal Court, the International Criminal Tribunal for former Yugoslavia, the International Criminal Tribunal for Rwanda, the International Tribunal for the Law of the Sea, and the World Trade Organization Dispute Settlement Mechanism are detailed in other reports in this issue.

I. International Court of Justice

The International Court of Justice (ICJ) is the principal judicial organ of the United Nations. It is endowed with a dual task, namely, to deliver judgments in contentious cases submitted to it by sovereign states and to issue nonbinding advisory opinions at the request of certain U.N. organs and agencies. It began the year 1999 (the 53rd since its inaugural sitting on April 18, 1946) with ten contentious cases and one advisory proceeding and ended the millennium with a record number of twenty-four cases. The court issued two judgments, one relating to the interpretation of a 1998 judgment and another a final decision on the merits.[1]

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1. *See* Request for Interpretation of the Court's Judgment of June 11, 1998, in the Case Concerning the Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria), Preliminary Objections (Nigeria v. Cameroon), Judgment of Mar. 25, 1999; Kasikili/Sedudu Island (Botswana/Namibia), Judgment of Dec. 13, 1999. The text of both decisions is available at <http://www.icj-cij.org/icjwww/idecisions.htm>.

In addition, the court issued one advisory opinion.[2] Hearings were held in two cases.[3] Thirty-five orders were issued by the full court (but none by its president or vice-president). No cases were discontinued and seventeen new contentious cases were introduced in 1999. No cases were pending or introduced before any chamber of the court. This section reports briefly on the main judicial activity and most important decisions rendered in 1999.[4]

A. Contentious Cases During 1999

1. *Request for Interpretation (Nigeria v. Cameroon)*

On March 25, 1999, the court issued a judgment[5] declaring inadmissible Nigeria's request, filed in the ICJ Registry on October 28, 1998, for interpretation of the court's Judgment of June 11, 1998, by thirteen votes to three.[6] The 1998 decision rejected Nigeria's preliminary objections concerning the court's jurisdiction and the admissibility of Cameroon's application, as amended.[7] This was the first time that the court was seized of a request for the interpretation of a judgment on preliminary objections while the related proceedings on the merits were still pending.[8]

Through its request for interpretation, Nigeria sought a declaration from the court, with regard to Nigeria's international responsibility for certain alleged incursions by Nigerian groups and armed forces into Cameroon's territory along the frontier between the two countries referred to by Cameroon, that the dispute before the court be confined to incidents specifically mentioned in Cameroon's application of March 29, 1994 (as amended on June 6, 1994), and that Cameroon could only present additional facts and legal considerations relating to those specified in its application. Nigeria complained that the court's Judgment of June 11, 1998 was unclear in that it did not specify which of a number of incidents referred to by Cameroon subsequent to its application of March 29, 1994 were to be considered as properly falling within the scope of the merits of the case before the court, making a distinction between incidents occurring along the disputed boundary between Nigeria and Cameroon and incidents that allegedly give rise to international responsibility. Cameroon argued that Nigeria's request for interpretation was inadmissible because the requirements of article 60 of the ICJ Statute and article 98, paragraphs 1–2, of the Rules of Court were not satisfied. In its view, Nigeria's request was a premature attempt to obtain additional or supplementary answers relating to the merits of the case.

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2. *See* Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights, Advisory Opinion of April 29, 1999, *available at* <http://www.icj-cij.org/icjwww/idecisions.htm>.

3. Kasikili/Sedudu Island (Botswana/Namibia) (Feb. 15-March 5, 1999); Legality of Use of Force (May 10–12, 1999), *available at* <http://www.icj-cij.org/icjwww/idecisions.htm>.

4. For a more detailed summary of the judicial activity of the court (including pleadings filed by parties in pending cases) during 1999, see Peter H.F. Bekker, *The 1999 Judicial Activity of the International Court of Justice*, 94 Am. J. Int'l L. 627 (2000).

5. *See* Request for Interpretation, *supra* note 1.

6. Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria), Judgment, Preliminary Objections (June 11, 1998), *available at* <http://www.icj-cij.org/icjwww/idecisions.htm>.

7. For a detailed summary (with commentary) of the court's June 11, 1998 decision, see Bekker, *supra* note 4, at 751.

8. The only two precedents on interpretation in the court's jurisprudence are *Request for Interpretation of the Judgment of 20 November 1950 in the Asylum Case (Colombia/Peru)*, 1950 I.C.J. 395 (Nov. 1950), and *Application for Revision and Interpretation of the Judgement of 24 February 1982 in the Case concerning the Continental Shelf (Tunisia/Libyan Arab Jamarihiya)*, 1985 I.C.J. 192 (Dec. 1985).

The court confirmed that it has jurisdiction to entertain requests for interpretation of any judgment rendered by it. Consequently, a judgment on preliminary objections, just as with a judgment on the merits, can be the subject of a request for interpretation under article 60 of the ICJ Statute. The court was satisfied that Nigeria's request related to the operative part of the judgment and, although it also concerned the reasons for the judgment, those reasons in the 1998 decision were inseparable from the operative part.

However, in connection with its consideration of the admissibility of Nigeria's request, the court noted that the object of a request for interpretation must be solely to obtain clarification of the meaning and scope of what the court has decided with binding force; the request must not seek to obtain an answer to questions not so decided. The court viewed its task as maintaining the principle of the finality (res judicata) of its judgments. It observed that its Judgment of June 11, 1998, had rejected the preliminary objection by which Nigeria complained that Cameroon had to confine itself, in relation to its submissions concerning incidents involving Nigeria's international responsibility, to the facts presented in its application and that additions presented subsequently by Cameroon had to be disregarded. The court recalled that it was satisfied in 1998 that Cameroon had not transformed the dispute brought before it into another dispute that was different in character from the one introduced by the application. The subsequent introduction into the proceedings of additional incidents and facts is governed by that principle. The court concluded that it was unable in 1999 to entertain Nigeria's request for interpretation without calling into question the effect of its 1998 decision as final and without appeal. Similarly, it could not examine complaints seeking to remove elements of law and fact that it had already authorized Cameroon to present.

2. *Legality of Use of Force*

On June 2, 1999, the court rejected separate requests filed by Yugoslavia against ten NATO member states on April 29, 1999, asking it to order those NATO members to "cease immediately [their] acts of use of force" and to "refrain from any act of threat or use of force" against Yugoslavia.

The court may indicate provisional measures of protection (comparable to an injunction under domestic law) aimed at preserving the respective rights of either party pending the court's final decision, only if it appears that it has prima facie jurisdiction over a case. In addition, there must be urgency to the extent that, unless provisional measures are indicated, there will be a risk of irremediable harm to the subject matter of the case. This was the first time in the court's history that it dismissed requests for the indication of provisional measures for lack of prima facie jurisdiction. Yugoslavia relied on three separate arguments to establish jurisdiction, each tailored to the specific circumstances pertaining to the respondent in each of the ten cases.

First, Yugoslavia invoked article IX of the 1948 Convention on the Prevention and Punishment of the Crime of Genocide (Genocide Convention), to which Yugoslavia and all ten NATO member states are parties, in an effort to establish jurisdiction in all of these cases. Pursuant to article IX, disputes between parties to the Genocide Convention relating to the interpretation, application, or fulfillment of the Convention are to be submitted to the ICJ at the request of any party to the dispute. The NATO parties argued that Yugoslavia failed to make substantial allegations that the alleged actions of any individual NATO party fell within the ambit of the Genocide Convention and that the Yugoslav complaint lacked any showing of the requisite intent on the part of any NATO party to commit genocide.

Moreover, they argued that the relief Yugoslavia asked for, relating to the use of force, was unrelated to the subject matter regulated by the Genocide Convention; therefore, the jurisdictional clause contained in the Convention could not serve to establish jurisdiction over the relief requested by Yugoslavia. Spain and the United States pointed out that reservations filed by them when they ratified the Genocide Convention prevented the court from assuming jurisdiction in their cases.

The court agreed with the NATO parties and pointed out that the threat or use of force against a state cannot in itself constitute an act of genocide within the meaning of article II of the Genocide Convention. Article II establishes the intended destruction of a national, ethnical, racial, or religious group as the essential characteristic of the crime of genocide. It did not appear to the court at the present stage of the proceedings that the NATO bombings entailed the element of intent towards a group as such (i.e., the people of Serbia), so that it was not in a position to find, at this stage of the proceedings, that the imputed acts were capable of coming within the provisions of the Genocide Convention.

Accordingly, article IX did not constitute a basis on which the court's jurisdiction could prima facie be founded in the ten cases. In relation to Spain and the United States, given the reservations validly filed by these states with respect to article IX, the court found that it was manifestly without jurisdiction. Consequently, the court dismissed the cases filed by Yugoslavia against Spain and the United States and ordered that they be removed from the General List of ICJ cases. The court allowed the cases against the other eight NATO parties to remain on its docket, on the basis that the court's finding of a lack of prima facie jurisdiction at a preliminary stage of the proceedings was not a definitive ruling on the question of the court's jurisdiction to deal with the merits of the cases, thus leaving unaffected the rights of the parties to submit arguments in respect thereof.

Second, in relation to France, Germany, Italy, and the United States, Yugoslavia invoked article 38, paragraph 5, of the ICJ Rules of Court as a jurisdictional basis. According to that provision, when a state files an application against another state that has not accepted the court's jurisdiction, the application is transmitted to the state named as respondent, but no action is taken in the proceedings unless and until that state has accepted the court's jurisdiction for the purposes of the case (so-called prorogated jurisdiction or *forum prorogatum*).[9] However, none of the states involved expressed a willingness to accept the court's jurisdiction for the purposes of these proceedings. Consequently, the court stressed that, in the absence of the requisite consent of France, Germany, Italy, and the United States, it could not exercise prorogated jurisdiction in these cases, not even prima facie.

Third, in relation to Belgium, Canada, the Netherlands, Portugal, Spain, and the United Kingdom, Yugoslavia contended that the court had jurisdiction based on the acceptance of Yugoslavia and those states of the court's compulsory jurisdiction under the "Optional Clause" of article 36, paragraph 2, of the ICJ Statute. However, the NATO parties pointed out that Yugoslavia's own declaration accepting the court's compulsory jurisdiction, deposited with the U.N. Secretary-General only a few days before the institution of these proceedings, limited recognition of the court's jurisdiction to disputes and events arising after April 25, 1999, the date on which Yugoslavia signed its declaration.

The court agreed with the NATO parties and found that, given that the bombings began on March 24, 1999, the legal dispute between Yugoslavia and the NATO parties arose well

9. On the instrument of *forum prorogatum*, see *Address of the President of the International Court of Justice before the Sixth Committee of the General Assembly*, 51 I.C.J.Y.B. 216 (1996–1997).

before April 25, 1999. Consequently, the reservation *ratione temporis* contained in Yugoslavia's own declaration led the court to conclude that the declarations made by the parties in these proceedings did not constitute a basis on which the court's jurisdiction could prima facie be founded in the cases against Belgium, Canada, the Netherlands, Portugal, Spain, and the United Kingdom.

Interestingly, the court concluded that it did not need to consider the question, arguably one of the most interesting arising in connection with these proceedings, of whether Yugoslavia is a member state of the United Nations and, by virtue of such membership, whether it is a party to the ICJ Statute. Belgium, Canada, the Netherlands, Portugal, Spain, and the United Kingdom all relied on resolutions of the General Assembly and the Security Council of the United Nations in arguing that the Federal Republic of Yugoslavia is not a member state of the United Nations nor a party to the ICJ Statute as a successor state to the former Socialist Federal Republic of Yugoslavia and that Yugoslavia cannot, therefore, rely on the ICJ Statute in establishing jurisdiction in these cases. Had the court addressed and upheld this argument, it would have had to declare inadmissible the Yugoslav applications and related requests and ordered all ten cases to be removed from the court's docket, as opposed to the ones involving Spain and the United States only.

Notwithstanding its rejection of the Yugoslav requests, the court expressed its deep concern with the human tragedy in Kosovo and with the loss of life and human suffering "in all parts of Yugoslavia." This statement can be seen as a reference to the ethnic cleansing campaign carried out by the Serb military and police in the province of Kosovo, which, together with Serbia and Montenegro, is a part of the Federal Republic of Yugoslavia. The court declared itself profoundly concerned with the use of force in Yugoslavia (the court did not indicate by whom), which "under the present circumstances . . . raises very serious issues of international law." The court emphasized that all parties before it must act in conformity with their obligations under the U.N. Charter and other rules of international law, including humanitarian law. Finally, the court reminded the parties that they should take care not to aggravate or extend the dispute and that, when such a dispute gives rise to a threat to the peace, breach of the peace, or act of aggression, the U.N. Security Council has special responsibilities under chapter VII of the U.N. Charter.[10]

3. *Application for Permission to Intervene in Land and Maritime Boundary between Cameroon and Nigeria*

The court's Order of October 21, 1999, authorized Equatorial Guinea to intervene in the case concerning the *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria)* pursuant to article 62, paragraph 1, of the ICJ Statute.[11] Neither Cameroon nor Nigeria objected in principle to the intervention of Equatorial Guinea. In its application requesting permission to intervene, filed in the ICJ Registry on June 30, 1999, Equatorial Guinea stated that it wished to protect its legal rights in the Gulf of Guinea by all legal means and to inform the court of its legal rights and interests so that these are not affected as the court addresses the question of the maritime boundary between Cameroon and Nigeria.

10. For a more elaborate summary (with commentary) of these orders, see Bekker, *supra* note 4, at 928.

11. Article 62(1) reads: "Should a state consider that it has an interest of a legal nature which may be affected by the decision in the case, it may submit a request to the Court to be permitted to intervene." The text is available at <http://www.icj-cij.org/icjwww/ibasicdocuments/ibasictext/ibasicstatute.htm>.

The general maritime area where the interests of the parties to the main case and Equatorial Guinea come together is one of active oil and gas exploration and exploitation, and Equatorial Guinea fears that any judgment extending the maritime boundary between Cameroon and Nigeria across the median line[12] with Equatorial Guinea would give concessionaires a reason to ignore its rights and interests.

The court's Order noted that Equatorial Guinea's application made it clear that it was not requesting the court to determine the question of Equatorial Guinea's maritime boundary with Cameroon and Nigeria. Negotiations regarding that question are pending among Cameroon, Nigeria, and Equatorial Guinea. The court also noted that Equatorial Guinea's intervention does not relate to the land boundary that is in dispute between Cameroon and Nigeria and that Equatorial Guinea was not seeking to become a party to the main case.[13] The court confirmed that the existence of a valid link of jurisdiction between the would-be intervener and the parties to the main case is not required to make an application for permission to intervene successful. Based on these and other considerations, the court decided, unanimously, to permit Equatorial Guinea to intervene as a nonparty "to the extent, in the manner and for the purposes set out in its application for permission to intervene."[14]

As a nonparty intervener, Equatorial Guinea will not have the rights that regular parties to a case enjoy. Thus, it will not have the right to appoint a judge ad hoc even though the court in its present composition does not include a judge of its nationality. On the other hand, Equatorial Guinea will not be obligated to accept the court's final judgment in this case as decisive since article 59 of the ICJ Statute provides that the decision of the court has no binding force except "between the parties" and in respect of a particular case.

The court fixed April 4, 2001, as the time limit for the filing of a written statement by Equatorial Guinea and July 4, 2001, as the time limit by which Cameroon and Nigeria may file their written observations on Equatorial Guinea's written statement.[15]

The full court had hitherto consistently denied requests for permission to intervene and had done so in the form of a formal judgment, as opposed to by way of an order. The only prior instance was recorded in 1990, when the five-judge Chamber formed to deal with the case concerning the *Land, Island and Maritime Frontier Dispute (El Salvador/Honduras)* decided to allow a limited intervention by Nicaragua.[16]

4. *Kasikili/Sedudu Island (Botswana/Namibia)*

On December 13, 1999, the court found, by eleven votes to four, that the boundary around Kasikili/Sedudu Island (Island) located in the Chobe River between Botswana and Namibia follows the line of the deepest soundings in the northern channel of the Chobe and that the Island forms part of the territory of Botswana. In addition, the court found, unanimously, that in the two channels around the Island, the nationals of, and vessels flying

12. The median line is the line dividing maritime zones between two states every point of which is equidistant from the coasts of each of those states.

13. Equatorial Guinea has not made a declaration accepting the court's compulsory jurisdiction under the "Optional Clause" of art. 36(2) of the Statute, nor are there any agreements in force among Cameroon, Nigeria, and Equatorial Guinea that confer jurisdiction on the court.

14. *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria)*, Order, para. 18(1) (Oct. 21, 1999), *available at* <http://www.icj-cij.org/icjwww/idecisions.htm>.

15. *See id.* at para. 18(2).

16. *See Land, Island and Maritime Frontier Dispute (El Salvador/Honduras)*, Judgment (intervention), 1990 I.C.J. 92 (Sept. 13, 1990).

the flags of both Botswana and Namibia are to enjoy equal national treatment. Botswana and Namibia jointly submitted their dispute concerning the Island by Special Agreement on May 29, 1996, asking the court to determine the boundary around the Island and its legal status on the basis of the rules and principles of international law and an 1890 treaty between Great Britain and Germany, whereby these colonial powers located the dividing line between their respective spheres of influence in this African region in the main channel of the Chobe River. Emphasizing different criteria, Botswana argued that the main channel constituting the boundary was the one running north and west of the Island and the Island belonged exclusively to Botswana. By contrast, Namibia believed that the channel running south of the Island governed and the Island was part of the territory of Namibia.

The court interpreted the terms of the Anglo-German Treaty by applying the customary rules of treaty interpretation set forth in article 31 of the 1969 Vienna Convention on the Law of Treaties.[17] Accordingly, it assigned priority to the text agreed upon at the time of the treaty's conclusion. However, it also took into account the present-day state of scientific knowledge. None of the provisions of the Anglo-German Treaty contained criteria through which it could be determined where exactly the boundary "descends the centre of the main channel" of the Chobe River, as article III stated. Botswana and Namibia not only disagreed on the method by which the expressions *centre* (in the English text of the treaty) and *thalweg* (in the German version) were to be interpreted but also on the location of the main channel indicating the boundary. Having examined various commonly used criteria and scientific works, the court concluded that the ordinary meaning of article III of the Anglo-German Treaty dictates that the northern channel of the Chobe around the Island be regarded as its main channel, support for which it found in three on-site investigations carried out in 1912, 1948, and 1985. The court also found support for its conclusion in the object and purpose of the Anglo-German Treaty as an instrument designed to establish a boundary between the territories of Great Britain and Germany, separating their spheres of influence.

Botswana and Namibia also invoked the subsequent practice of Great Britain and Germany and their successors as an element relevant for the interpretation of the Anglo-German Treaty. However, the court concluded that such practice did not result in any interpretative agreement or in any understanding or practice in the treaty's application establishing the agreement of the parties regarding the treaty's interpretation, as meant in article 31(3) of the Vienna Convention. The court did consider that factual findings made in reports prepared in 1912, 1948, and 1985 were not, as such, disputed at the time and supported its conclusions with respect to the ordinary meaning to be given to article III of the Anglo-German Treaty. The court did not accept Namibia's argument that the presence on the Island of members of the Masubia tribe and their livestock constituted subsequent practice in the treaty's application as meant in article 31(3)(b) of the Vienna Convention. The court agreed with Botswana that such presence was intermittent and was not linked to territorial claims by the relevant authorities.

Since no map was appended to the Anglo-German Treaty officially expressing the intentions of the contracting parties with respect to the course of the boundary, the court could not find that the authorities concerned had accepted any available maps as constituting subsequent practice in the application or interpretation of the Anglo-German Treaty or as

17. Vienna Convention on the Law of Treaties, May 23, 1969, art. 27, 1155 U.N.T.S. 32, U.N. Doc. A/CONF.39/27 (1969).

recognition of the boundary shown on any map. In other words, the cartographic evidence presented in this case left unaltered the results of the court's textual interpretation of the treaty.

Having decided that the German term *thalweg* was determinative in article III of the treaty, the court noted that the parties agreed that the *thalweg* is formed by the line of deepest sounding, and it concluded that the boundary between Botswana and Namibia follows that line in the northern channel around the Island.

5. *General List*

As of December 31, 1999, the General List of ICJ cases was composed as follows: *Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar v. Bahrain); Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libya v. United Kingdom); Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libya v. United States); Oil Platforms (Iran v. United States); Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia-Herzegovina v. Yugoslavia); Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria); Gabcikovo-Nagymaros Project (Hungary/Slovakia); Sovereignty over Pulau Sipadan and Pulau Ligitan (Indonesia/Malaysia); Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo); LaGrand Case (Germany v. United States); Legality of Use of Force (Yugoslavia v. Belgium); Legality of Use of Force (Yugoslavia v. Canada); Legality of Use of Force (Yugoslavia v. France); Legality of Use of Force (Yugoslavia v. Germany); Legality of Use of Force (Yugoslavia v. Italy); Legality of Use of Force (Yugoslavia v. the Netherlands); Legality of Use of Force (Yugoslavia v. Portugal); Legality of Use of Force (Yugoslavia v. United Kingdom); Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Burundi); Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Rwanda); Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda); Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Yugoslavia); Aerial Incident of 10 August 1999 (Pakistan v. India) and Maritime Delimitation between Nicaragua and Honduras in the Caribbean Sea (Nicaragua v. Honduras).*[18]

B. Advisory Jurisdiction

1. *Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights*

On April 29, 1999, the court issued an Advisory Opinion in reply to a request, filed in the ICJ Registry on August 10, 1998, from the Economic and Social Council (ECOSOC), one of the principal organs of the United Nations, concerning

> the legal question of the applicability of article VI, Section 22, of the Convention on the Privileges and Immunities of the United Nations [General Convention] in the case of Dato' Param Cumaraswamy as Special Rapporteur of the Commission on Human Rights on the independence of judges and lawyers . . . and on the legal obligations of Malaysia in this case.

The case arose from the refusal by the Malaysian courts to accept, *in limine litis*, the immunity of U.N. Special Rapporteur Dato' Param Cumaraswamy, a prominent Malaysian

18. *See* ICJ Communiqué 99/52 (Dec. 8, 1999). Nicaragua's Application was filed in the ICJ Registry on December 8, 1999.

lawyer, in connection with four lawsuits brought against him by different plaintiffs in Malaysia. The plaintiffs took legal action against Cumaraswamy after an interview with the Special Rapporteur entitled "Malaysian Justice on Trial" appeared in the November 1995 issue of the U.K. magazine *International Commercial Litigation*. The plaintiffs complained that words ascribed to Cumaraswamy, commenting on Malaysian cases in which the plaintiffs had prevailed, were defamatory. The lawsuits caused U.N. Secretary-General Kofi Annan to intervene, claiming immunity on behalf of the Special Rapporteur on the basis of section 22 of the General Convention. Section 22 provides that experts on mission for the United Nations shall be accorded such privileges and immunities as are necessary for the independent exercise of their functions, including, in respect of words spoken in the course of their mission, "immunity from legal process of every kind." The Malaysian courts refused to give effect to the immunity certificates issued by the Secretary-General to the Malaysian authorities. After negotiations between the U.N. and the Malaysian government failed, the dispute resolution mechanism of the General Convention was triggered for the first time in the court's history.

First, the court confirmed the applicability to Special Rapporteur Cumaraswamy of section 22 of the General Convention, recognizing that he qualified as an expert on mission for the United Nations. Second, the court was satisfied that the words used by Cumaraswamy in the interview were actually spoken in the course of the performance of his mission for the U.N. Commission on Human Rights. Consequently, he was entitled to immunity from legal process with respect to those words. The court also confirmed that the U.N. Secretary-General has a pivotal role to play in immunity matters, leading it to conclude that he was justified to assert immunity on behalf of Cumaraswamy. In support of its finding, the court pointed out that the interview contained specific disclaimers concerning Cumaraswamy's official capacity and that the U.N. Commission on Human Rights had extended his mandate subsequent to the publication of the interview.

Third, the court found that the Government of Malaysia had failed to comply with its obligations under the U.N. Charter and the General Convention to inform the Malaysian courts of the assertion by the Secretary-General of Cumaraswamy's immunity from legal process. In the court's opinion, the Secretary-General's finding creates a presumption of immunity that can only be set aside for the most compelling reasons and is thus to be given the greatest weight by national courts. But the court failed to accept the view, expressed by the U.N. Legal Counsel and various states appearing in the proceeding, that the Secretary-General has the exclusive authority to determine immunity issues with conclusive effect on national courts. This leaves open the possibility that national courts may find compelling reasons to overrule the Secretary-General's finding in a given case. The court found that Malaysia should not have allowed its courts to order a full trial on the plaintiffs' claims after denying Cumaraswamy's preliminary plea of immunity. Immunity issues must be decided expeditiously at the outset of the litigation. Unanimously, the court found that Cumaraswamy's immunity entails holding him financially harmless for any costs imposed upon him by the Malaysian courts. Finally, the court ordered Malaysia to communicate the court's decision to the competent Malaysian courts in order that Malaysia's international obligations be given effect and Cumaraswamy's immunity be respected.[19]

19. For a more detailed summary (with commentary) of this decision, see Bekker, *supra* note 4, at 913.

C. Composition of the Court

Regular triennial elections were held at U.N. Headquarters in New York on November 3, 1999. The General Assembly and the Security Council, voting simultaneously but separately, reelected Judges Gilbert Guillaume (France), Raymond Ranjeva (Madagascar), Rosalyn Higgins (United Kingdom), and Gonzalo Parra-Aranguren (Venezuela) for nine-year terms commencing February 6, 2000. Vice-President Christopher Weeramantry (Sri Lanka), who was not reelected, was replaced by Awn Shawkat Al-Khasawneh (Jordan), a member of the International Law Commission. The new court will be composed as follows (in order of seniority): Shigeru Oda (Japan), Mohammed Bedjaoui (Algeria), Gilbert Guillaume (France), Raymond Ranjeva (Madagascar), Géza Herczegh (Hungary), Shi Jiuyong (China), Carl-August Fleischhauer (Germany), Abdul Koroma (Sierra Leone), Vladlen Vereshchetin (Russian Federation), Rosalyn Higgins (United Kingdom), Gonzalo Parra-Aranguren (Venezuela), Pieter Kooijmans (the Netherlands), Francisco Rezek (Brazil), and Awn Shawkat Al-Khasawneh (Jordan). The election to replace outgoing President Stephen Schwebel (United States), whose resignation effective February 29, 2000 was announced on December 15, 1999, was set for March 2, 2000.[20] On September 20, 1999, the Registry announced the decision of Registrar Eduardo Valencia-Ospina (Colombia) to leave office on February 5, 2000, one year before the expiration of his second term as Registrar.[21]

II. United Nations Compensation Commission

The United Nations Compensation Commission (UNCC), a subsidiary organ of the U.N. Security Council, was established by the Security Council at the close of the Gulf War in 1991 to pay compensation to foreign governments, nationals, and corporations for any "direct loss, damage, . . . or injury . . . as a result of its [Iraq's] unlawful invasion and occupation of Kuwait."[22] The UNCC had an extremely productive if not doctrinally groundbreaking year in 1999, during which it completed the first phase and commenced the second phase of payments made available to successful claimants, established the prioritization and mechanism of payments in the second phase, and approved twenty-two panel reports that decided tens of thousands of claims. The UNCC anticipates the completion of the last panel reports by July 2003 under its current work program.

A. Payment of UNCC Awards

Funding for awards comes from the UNCC-administered United Nations Compensation Fund, which receives thirty percent of the revenue derived from sales of Iraqi petroleum and petroleum products pursuant to the "oil-for-food" mechanism established by Security

20. *See* ICJ Communiqué 99/54 (Dec. 15, 1999). The election of Professor Thomas Buergenthal to fill the vacancy resulting from President Schwebel's resignation was held in New York on March 2, 2000, as decided by the Security Council in its Resolution 1278 adopted on November 30, 1999.

21. *See* ICJ Communiqué 99/42 (Sept. 20, 1999).

22. S.C. Res. 687, U.N. SCOR, 46th Sess., 2981st mtg., para. 16, U.N. Doc. S/RES/687 (1991). For a concise overview of the structure and jurisdiction of the UNCC, see John R. Crook, *The United Nations Compensation Commission—A New Structure to Enforce State Responsibility*, 87 Am. J. Int'l L. 144 (1993). The UNCC's web site, <http://www.unog.ch/uncc>, includes a bibliography of UNCC-related publications in a number of languages.

Council Resolution 986 and subsequent resolutions. The UNCC completed the first phase of payments on July 8, 1999.[23] Total payments in 1999 under the first phase exceeded U.S.$1.05 billion, bringing the final amount available during phase one to over U.S.$3.1 billion for more than 1.4 million successful claimants.

For the second phase of payments,[24] the Governing Council (the Council) expressed its desire to complete payments for awards in categories "A" and "C" while providing "meaningful compensation" for successful claimants in categories "D" (claims of individuals for damages above U.S.$100,000), "E" (corporate claims), and "F" (government claims). It decided that transfers would be made for approved claims in all categories when there were sufficient funds to make payment to each of U.S.$25,000. Once that amount was paid for "all awards of claims in categories 'A' and 'C' and all approved claims in categories 'D', 'E' and 'F'," the amount of further payments on all claims would increase to U.S.$75,000. The UNCC commenced the second phase of payments on September 23, 1999 and, through December, made available for distribution to over 3000,000 successful claimants in categories "A," "C," "D," "E," and "F," total amounts exceeding U.S.$1.16 billion. At year-end, the overall amount of compensation made available by the UNCC to successful claimants stood at approximately U.S.$4.28 billion, of which payments in 1999 accounted for greater than fifty percent.

B. Governing Council Decisions

Eighth Special Session. On January 21, 1999, the Council, whose composition is that of the fifteen-member Security Council, elected to serve as president and vice-president the Permanent Representatives of the Netherlands and Argentina, respectively.

Thirty-First Session. The Council considered and approved seven panel reports.[25] Six involved corporate claims:[26] 259 "E2," "E3," and "E4" claims alleging U.S.$879.5 million in damages. The panels recommended payment on 155 claims in the amount of U.S.$173.6 million. The seventh report involved government claims:[27] twenty-four "F1" claims alleging U.S.$39.5 million in damages. The panel recommended payment on twenty claims in the amount of U.S.$14.6 million. In exercising its review function, the Council requested and

23. Individual claimants received priority in the first phase, *Governing Council Decision 17, Priority of Payment and Payment Mechanisms*, Governing Council, 41st mtg., U.N. Doc. S/AC.26/Dec.17 (1994), which involved the initial payment of U.S.$2,500 to each successful claimant in categories "A" (claims of individuals for departure from Kuwait or Iraq) and "C" (claims of individuals up to U.S.$100,000) and payment in full to successful claimants in category "B" (claims of individuals for death or serious personal injury).

24. Governing Council Decision 73, 88th mtg., U.N. Doc. S/AC.26/Dec.73 (1999).

25. Governing Council Decisions 60–66, 86th mtg., U.N. Docs. S/AC.26/Decs.60–66 (1999). UNCC panel reports analyze the merits of each claim and thus (as approved) reflect, to the richest extent, the UNCC's body of law. The reports are available at <http://www.unog.ch/uncc>. The twenty-two reports approved in 1999 exceed 2,000 pages in length.

26. "E" claims are grouped into four subcategories: "E1" refers to oil sector claims; "E2" refers to non-Kuwaiti corporate claims, excluding oil sector, construction/engineering, and export guarantee claims; "E3" refers to non-Kuwaiti construction/engineering claims; and "E4" refers to Kuwaiti corporate claims, excluding oil sector claims.

27. "F" claims are grouped into three subcategories: "F1" refers to government claims for losses relating to departure and evacuation costs or damage to physical property and claims filed by international organizations; "F2" refers to claims of Jordan and Saudi Arabia, excluding claims for environmental damages; and "F3" refers to claims of Kuwait, excluding claims for environmental damages.

received assurances from one corporate claims panel that the panel's use of the phrase "clear and convincing" in its lost profit analysis in three reports was not intended to create a new or higher evidentiary standard than that set out by Council decisions and that the recommendations would have remained unchanged using the applicable "reasonable certainty" standard.[28]

Thirty-Second Session. The Council considered and approved five panel reports (with the exception of one withdrawn corporate claim).[29] Three involved installments of individual claims, including the final installment of "C" claims in which the panel recommended payments of U.S.$1.9 billion on 67,079 of the 71,069 remaining claims. The Council's approval of this report concluded the processing of over 1.6 million claims in category "C." The other two reports involving individual claims installments were issued by the "D" panel, which recommended payment on 377 of 440 "D" claims in the amount of U.S.$19.5 million (the claimants had alleged U.S.$102.7 million in damages). The same panel also recommended payment of 636 remaining "A" claims in the amount of U.S.$2.5 million that were still pending, due to a technical error after the "A" panel had concluded its work. Two reports involved corporate claims: eighteen "E1"claims alleging U.S.$14.99 billion in damages. The panel recommended payment on fifteen claims in the amount of U.S.$2.86 billion.

Thirty-Third Session. The Council considered and approved six panel reports.[30] Three involved a total of fifty-three "E3" claims alleging U.S.$1.07 billion in damages. The panels recommended payment on twenty-two claims in the amount of U.S.$44.4 million. Two additional corporate claims reports involved a total of 521 "E4" claims alleging over U.S.$719.7 million. The panels recommended payment on 274 claims in the amount of U.S.$189.8 million. In approving the "E4" reports, the Council received clarification of panel findings concerning relief payments made by corporate entities to confirm the proper application of the Council's decision on point.[31] The sixth report was issued by the "D" panel and recommended adjustments to approved awards in that category for losses also compensated in categories "A," "B," and "C." The panel had anticipated the need for these adjustments but had reserved its calculations until the data was complete.

Thirty-Fourth Session. The Council considered and approved four panel reports involving installments of "D," "E2" (with the exception of two withdrawn claims), "F2," and "F3" claims.[32] The "D" report addressed 850 claims alleging U.S.$98.2 million in damages. The panel recommended payment on 767 claims in the amount of U.S.$76.4 million. The "E2" report addressed 179 claims alleging U.S.$10.53 billion in damages. The panel recommended payment on eighty-eight claims in the amount of U.S.$289.8 million. The "F2"

28. Governing Council Decisions 60 and 62, U.N. Compensation Comm., 86th mtg., U.N. Docs. S/AC.26/Decs.60, 62 (1999).

29. Governing Council Decisions 67–70 and 72, U.N. Compensation Comm., 88th mtg., U.N. Docs. S/AC.26/Decs.67–70, 72 (1999). The claim was withdrawn after the report's submission. The information about this report that follows does not include the withdrawn claim.

30. Governing Council Decisions 74–78 and 80, U.N. Compensation Comm., 90th mtg., U.N. Docs. S/AC.26/Decs.74–78, 80 (1999).

31. Governing Council Decisions 77–78, U.N. Compensation Comm., 92nd mtg., U.N. Docs. S/AC.26/Decs.77, 78 (1999).

32. Governing Council Decisions 81–84, U.N. Compensation Comm., 92nd mtg., U.N. Docs. S/AC.26/Decs.81–84 (1999). The two claims were withdrawn after the report's submission. The information about this report that follows does not include the withdrawn claims.

and "F3" reports addressed forty claims alleging U.S.$2.39 billion in damages. The reports recommended payment on twenty-nine claims in the amount of U.S.$1.6 billion. In approving the "F2" report, the Council noted that compensation for losses of a state tourism ministry were recoverable under the unique facts of the particular claim on the theory that such losses resulted from the departure of persons from, or their inability to leave, Iraq or Kuwait during the relevant time period.[33] The Council thus effectively cautioned against reading the report to support an expansion of applicable causation doctrine.

III. Iran-United States Claims Tribunal

The Iran-United States Claims Tribunal was established in 1981 to resolve disputes between the governments of Iran and the United States, and their respective nationals, arising out of the Iranian Revolution of 1979. The vast majority of claims have been resolved, but several important interpretative claims (A claims) and intergovernmental claims (B claims) remain outstanding. The total amount awarded to U.S. parties exceeds $2.1 billion, excluding interest, while the total amount awarded to Iran exceeds $1 billion.

A. *Case B54*

On March 30, 1999, Chamber One rendered an interlocutory award in *Case B54* addressing the question of the scope of its jurisdiction under article II of the Claims Settlement Declaration (CSD). At issue was a claim by Iran against the United States and Westinghouse Electric S.A., a wholly-owned subsidiary of a U.S. corporation (Westinghouse), over the alleged contractual interference by the United States in a contract between Westinghouse and Iran. Specifically, Iran alleged that because the United States withheld certain export permits, Westinghouse was forced to breach its contractual obligations with Iran. The Tribunal held that it lacked jurisdiction over the claim against Westinghouse because the claim was not timely filed and because, as set forth in *Case A2*, the Tribunal has no jurisdiction over claims by one government against the nationals of another. The Tribunal further held that it lacked jurisdiction over the claim of contractual interference by the United States because article II(2) of the CSD confers jurisdiction over claims by Iran against the United States "arising out of contractual arrangements between them for the purchase and sale of goods and services." The Tribunal concluded that Iran failed to meet this requirement because Iran had not alleged the existence of a contract between Iran and the United States or established that Westinghouse was somehow a government-controlled entity. Finally, the Tribunal held that it did have jurisdiction over the claim by Iran against the United States to the extent that it was an interpretative dispute over the general question of whether the withholding of export permits violated the U.S. obligation in the Algiers Accords to restore the financial position of Iran as it existed on November 14, 1979. However, because only the Full Tribunal has the authority to hear such disputes, the Tribunal reclassified the case as *Case A32* and relinquished jurisdiction to the Full Tribunal.

B. *Case A15(IV)/A24*

On December 28, 1999, the Full Tribunal rendered a partial award in *Case A15(IV)/A24* concerning nine claims addressing the general question of whether the United States

33. Governing Council Decision 83, U.N. Compensation Comm., 92nd mtg., U.N. Doc. S/AC.26/Dec.83 (1999).

breached its obligations under the Algiers Accords to terminate litigation in U.S. courts. Specifically, General Principle B of the General Declaration obligates both governments to "terminate all litigation as between the government of each party and the nationals of the other, and to bring about the settlement and termination of all such claims through binding arbitration." It also obligates the United States to

> terminate all legal proceedings in United States courts involving claims of United States persons and institutions against Iran and its state enterprises, to nullify all attachments and judgments obtained therein, to prohibit all further litigation based on such claims, and to bring about the termination of such claims through binding arbitration.

The Full Tribunal held that (i) the United States did not violate its obligations to terminate all litigation in U.S. courts by suspending legal proceedings involving claims that have been dismissed by the Tribunal for lack of jurisdiction. However, Iran should be reimbursed for certain legal expenses incurred (i) regarding claims within the Tribunal's jurisdiction or claims not yet determined to be outside the Tribunal's jurisdiction; (ii) with respect to cases that have been dismissed by the Tribunal because of an Iranian court forum selection clause, it is for national courts, not the Tribunal, to determine the enforceability of such clauses and that any litigation in U.S. courts with respect to such issues does not violate U.S. obligations; (iii) with respect to lawsuits filed in U.S. courts after the Algiers Accords were signed for the sole purpose of tolling the applicable statute of limitations, the United States had violated its obligation to "prohibit all further litigation" and that Iran should be reimbursed for certain legal expenses incurred in respect of such litigation; (iv) General Principle B does not oblige the United States to terminate litigation involving claims of U.S. nationals against Iran in courts outside the United States; (v) General Principle B does not obligate the United States to nullify attachments of Iranian property that were obtained by U.S. nationals in U.S. courts prior to issuance of the Executive Order freezing Iranian assets on November 14, 1979; (vi) the United States was obligated to nullify post-freeze attachments in a timely fashion; (vii) the United States did not violate its obligations by failing to nullify judgments involving claims that have been dismissed by the Tribunal for lack of jurisdiction. However, Iran should be reimbursed for certain legal expenses incurred in respect of U.S. judgments that remained in existence after July 19, 1981; and (viii) the United States violated its obligations by not acting to have certain litigation in U.S. courts in the case of *Foremost-McKesson, Inc. v. Iran* dismissed to the extent this litigation related to claims resolved by the Tribunal on the merits in the Tribunal case of *Foremost-McKesson, Inc., et al. v. Iran.*[34] However, to the extent the litigation does not fall within the res judicata of the Tribunal's decision in *Foremost*, it is not contrary to the Algiers Accords.

C. Impartiality Challenge by Government of The Islamic Republic of Iran

On August 25, 1999, the Appointing Authority to the Iran-United States Claims Tribunal rendered a decision with respect to the challenge by Iran to the independence and impartiality of the president of the Iran-United States Claims Tribunal. Iran alleged that the president collected evidence in a case before the Tribunal, *A28*, by requesting his legal assistant to determine the balance of the Security Account, an issue that is central to the

34. Foremost-McKesson, Inc. v. Iran, Award No. 220-37/231-1 (Apr. 11, 1986).

parties' submissions. The Appointing Authority concluded that the president had not collected evidence and that the balance in the account was not a central issue in *A28*. "Far from being the 'central' issue in the Case [A28], [it] is not an 'issue' at all. It is a simple question of fact . . . . One cannot be partial, or impartial, about a Bank's statement of the amount of the balance of an account."[35] The Appointing Authority also rejected Iran's argument that the president lied or caused his legal assistant to lie about the legal secretary's inquiry to the bank regarding the balance in the Security Account. The Appointing Authority concluded that there was "no ground whatever for any justifiable belief" that the president told a lie or that his legal secretary was told to tell a lie pertaining to the inquiry as to the balance in the Security Account.

On October 21, 1999, upon Iran's request for revision of the decision, the Appointing Authority confirmed his position with respect to the challenges of Iran.

D. *Gulf Associates Inc. v. Iran* (Award No. 594–385–2)

On October 7, 1999, Chamber Two rendered a decision regarding the claim by Gulf Associates Inc. (Gulf) that Iranian-controlled entities failed to pay Gulf the debit balances they owed it, thereby breaching their contracts with Gulf. Pursuant to article II of the CSD, the Tribunal held that it could exercise jurisdiction over the claim if fifty percent or more of the capital of Gulf was owned by U.S. nationals. Gulf alleged that the company was owned by three U.S. nationals, as evidenced by stock certificates. Iran alleged that these stock certificates were forged. The Tribunal held that allegations of forgery must be proven by clear and convincing evidence and that Iran had "not proven by clear and convincing evidence that Share Certificates 10 to 12 or the stock transfer ledger of Gulf Associates were forged to support a claim before this Tribunal. Irregularities, abundant as they may be in this Case, in the corporate records of a small family-owned company, without more, do not amount to fraud." On the merits, the Tribunal dismissed in part and approved in part Gulf's claim for reimbursement of balances owed.

E. *Bank Markazi Iran v. Federal Reserve Bank of New York* (Award No. 595–823–3)

On November 18, 1999, Chamber Three rendered a decision regarding the claim by Bank Markazi that the Federal Reserve Bank of New York (New York Fed) breached its obligations to invest funds during the period when Iranian assets were frozen pursuant to an executive order. Chamber Three noted that for the Tribunal to have jurisdiction over the claim, it must be established that the New York Fed is an agency, instrumentality, or entity controlled by the U.S. government. However, given the complexity of this question, the Tribunal concluded that it would resolve the case on the merits and not reach the jurisdictional question. "In light of both the relatively straightforward nature of the merits, and of the decision relating thereto, and in the interests of judicial . . . economy, the Tribunal believes that, under the specific circumstances, th[e] jurisdictional issue need not be resolved."[36] Regarding the merits, the Tribunal held that there is no evidence that Claimant's instructions regarding its ongoing investments were ignored, and that the New York Fed

35. Appointing Authority Decision (Aug. 25, 1999), *reprinted in* Mealey's Int'l Arb. Rep. (Sept. 1999).
36. Bank Markazi Iran v. Federal Reserve Bank of New York, Award No. 595–823–3, para. 35 (1999).

continued to invest Bank Markazi's funds in accordance with standing instructions. Moreover, the New York Fed did not breach its obligations to Bank Markazi because the bank was deprived of control of the assets as a result of the freeze order. The freeze order created a *force majeure* event that the New York Fed was obligated to abide by and that excused it from liability.

IV. Claims Resolution Tribunal for Dormant Accounts in Switzerland

The Claims Resolution Tribunal for Dormant Accounts in Switzerland (CRT) was established in 1998 to resolve claims relating to Holocaust-era dormant Swiss bank accounts. The CRT is unusual in that it is a mass arbitration tribunal that resolves claims in a judicial case-by-case manner rather than through an administrative procedure using predetermined criteria (as with certain types of claims before the UNCC). The CRT's jurisdiction, with limited exception, is over accounts opened by non-Swiss nationals or residents that have been dormant since May 9, 1945 and that were made public by the Swiss Bankers Association in 1997.

Most of 1999 was spent on the so-called "initial screening" procedure, a process designed to protect the banks' obligation of confidentiality to account holders. This process establishes whether a claimant has submitted any information on his or her entitlement to the dormant account or whether it is otherwise apparent that he or she is not entitled to the account. If the claimant does not meet this minimum threshold, the CRT will decline to disclose details about the account and, subject to a request for reconsideration, the claim will not go forward to arbitration. As of December 31, 1999, of the approximately 9,400 claims submitted, over 3,100 have been disclosed by the banks and over 6,100 decisions have been rendered in the initial screening procedure. Of the claims that have been submitted to the CRT for disclosure, approximately ninety percent did not go forward to arbitration because they did not pass the initial screening threshold.

If a claim survives initial screening, it will proceed either under a "fast track" or "ordinary" procedure. The former is a process in which the bank offers to settle the claim subject to confirmation by the CRT that the settlement offer conforms with the claims resolution process. The ordinary procedure, by contrast, involves a full review of the claims and all available evidence in an expedited procedure. As of December 31, 1999, over 2,100 claims had been classified as fast track, while over 1,200 claims had been classified as ordinary procedure. As of December 31, 1999, the CRT rendered over 1,600 awards in these procedures, with over 24.5 million Swiss Francs awarded to claimants. These awards do not include any monies for special interest and reimbursement of bank fees, which will be addressed at subsequent stages of the proceedings.

None of the CRT's decisions have been made available to the general public, although relevant decisions soon will be published on the CRT's web site.[37] It is anticipated that in 2000 the CRT will finalize adjudication of all claims submitted to accounts published in 1997.

In December 1999, the Independent Committee of Eminent Persons (the Volcker Commission), the body charged with supervising the CRT, issued its Report on Dormant Ac-

37. *See* <http://www.crt.ch>.

counts of Victims of Nazi Persecution in Swiss Banks (the Volcker Report). This report was the result of a three-year investigation that included an independent audit of the banking practices of 254 Swiss banks from the Second World War to the present. As a result of this audit, the Volcker Report concluded that there was "no evidence of systematic destruction of records of victim accounts, organized discrimination against the accounts of victims of Nazi persecution, or concerted efforts to divert . . . funds . . . to improper purposes." However, there was

> confirmed evidence of questionable and deceitful actions by some individual banks . . . , including withholding of information from Holocaust victims or their heirs . . . , inappropriate closing of accounts, failure to keep adequate records, . . . and a general lack of diligence-even active resistance-in response to earlier private and official inquiries about dormant accounts.

The Volcker Report also concluded that were a total of 53,886 accounts with a probable or possible relationship to victims of Nazi persecution. Of these, 10,471 were open and dormant accounts that matched the names of known Holocaust victims, or had other characteristics suggesting that there may be a probable or possible relationship between the account holders and victims of Nazi persecution. The remaining 43,415 accounts were either closed accounts, or accounts that could not be matched to victims' names and lacked evidence of residence by an account holder in an Axis or Axis-occupied country. As a result of these newly discovered dormant and closed accounts, it is anticipated that a third list of accounts will be published in 2000 and that the CRT will adjudicate claims to these accounts utilizing a revised set of rules of procedure.

V. International Commission on Holocaust Era Insurance Claims

The International Commission on Holocaust Era Insurance Claims (Commission), chaired by Former U.S. Secretary of State Lawrence S. Eagleburger, was founded in 1998 to investigate and resolve Holocaust-era insurance claims. The Commission is composed of U.S. insurance commissioners, representatives of the State of Israel, international Jewish and Holocaust survivor organizations, and representatives of major European insurance companies. Observers include the United States and other governments, as well as European and Israeli insurance regulators.

In 1999, the Commission processed several hundred fast track offers of payment by insurance companies. Eagleburger described such offers as evidence that the insurance companies "affirmed their support for the decisions taken by the Commission and have paved the way for the roll out of the full claims process."[38] The Commission also spent much of 1999 preparing for the inauguration of a formal claims procedure. Despite an October 29, 1999 deadline, the Commission failed to launch a formal claims procedure for resolving unpaid insurance claims to Holocaust victims and their heirs. It is anticipated that such a procedure will be launched in early 2000. Under this procedure, it is expected that the Commission will adopt a relaxed standard of proof to assess the validity of the unpaid insurance claims. Such a standard would require claimants to show that it is "plausible" in light of all the circumstances that the claimant is entitled to the benefits of the policy.

38. *European Insurers Start Making Offers to Holocaust Survivors*, FED. & ST. INS. WK. (Sept. 27, 1999), *available in* 1999 WL 13960174.

In addition, the Commission will utilize a uniform valuation method in making offers on valid unpaid insurance claims. One of the major points of contention was whether insurance companies should pay the face value or the present day value of the policies. The Commission agreed upon the latter approach, utilizing long-term government bond valuations that approximate ten times the face value of the policies. Finally, the Commission will establish an appeal procedure such that if a claimant disagrees with an insurance company's decision, the decision may be appealed to a panel established by the Commission. Such an appeal mechanism will only apply to insurance companies that are members of the Commission.

European insurance companies have been under pressure to become a part of the Commission to protect against onerous measures, including license suspensions, threatened by U.S. state insurance commissioners. The U.S. Department of State has severely criticized such measures, with Under Secretary of State Stuart Eizenstat stating that state insurance commissions sanctioning "companies participating in the Eagleburger Commission would gravely undermine the Commission's work to the ultimate disadvantage of Holocaust survivors." Despite such pressure, certain insurance companies have refused to join the Commission, stating that Holocaust victims have been compensated as part of state restitution programs, and this compensation included redressing wrongs of the insurance industry.

Although there is uncertainty as to the amounts involved, analysts have estimated that between $1 billion and $4 billion worth of claims are outstanding.[39]

39. Details regarding the ICHEIC can be found at its web site <http://www.icheic.org>.